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No. 08-814

Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID ELLIS,

Petitioner,

v.

BRADLEY COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

The Court should grant Petitioner Ellis the relief he requests because the dismissal of his employment discrimination complaint under Federal Rule of Civil Procedure 12(b)(6) – not Rules 56 or 50 – for "failure to state a claim for relief" constitutes a gross departure from the accepted and usual course of judicial proceedings that calls for an exercise of the Court's supervisory power.

The lower courts' sole basis for dismissing Ellis' complaint was that he was not an "employee" of Respondent Bradley County, Tennessee, for purposes of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.* ("FMLA") or the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA"). Making this decision on a Rule 12(b)(6) motion before affording Ellis the opportunity to present evidence showing that he was an employee of the county conflicts with relevant decisions of this Court.

The Court has instructed that the definition of "employee" under the ADA must be interpreted broadly. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447-49 and n.6, 123 S. Ct. 1673, 155 L. Ed. 2d 615 (2003) ("[A] broad reading of the term 'employee' would – consistent with the statutory purpose of ridding the Nation of discrimination – tend to expand the coverage of the ADA by enlarging the number of employees entitled to protection and by reducing the number of firms entitled to exemption.").

Moreover, the Court has repeatedly stated that "'all of the incidents of the [parties'] relationship must be assessed and weighed'" before making the determination of whether one is an "employee." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 324, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992) (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258, 88 S. Ct. 988, 19 L. Ed. 2d 1083 (1968) (examining "the total factual context")). In *Darden* the Court reiterated that:

> 'In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.'

Darden, 503 U.S. at 323-24 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989)).

This common law agency or "master-servant" test is applicable "when determining whether an individual is an 'employee' who may invoke the ADA's protections against discrimination in 'hiring, advancement, or discharge. . . .'" *Clackamas*, 538 U.S. at 447 n.6. Indeed, the United States Equal Employment Opportunity Commission has set forth guidelines that "list 16 factors – taken from *Darden* . . . that may be relevant to 'whether the employer controls the means and manner of the worker's work performance.'" *Id.* at 449. Application of the *Darden* test necessarily depends upon "the total factual context" as established by the factual "evidence." *Weary v. Cochran*, 377 F.3d 522, 524-28 (6th Cir. 2004), *reh'g denied* (applying *Darden* to "evidence that shed[s] light on how the parties themselves viewed the nature of their working relationship" and stating, "whether a plaintiff qualifies as an employee under the Act 'is a mixed question of law and fact'"); *Johnson v. City of Saline*, 151 F.3d 564, 568 (6th Cir. 1998) (applying *Darden* in ADA case).

Here, the county affected Ellis' access to his job as detailed in his complaint (Pet. 26a-30a) and controlled his employment benefits as acknowledged by the lower courts. (Pet. 15a). Therefore, the county may be held liable under the ADA. *Christopher v. Stouder Mem. Hosp.*, 936 F.2d 870, 875 (6th Cir.), *cert. denied*, 502 U.S. 1013, 112 S. Ct. 658, 116 L. Ed. 2d 749 (1991) ("Title VII does not require a formal employment relationship between the plaintiff and the defendant. Rather, a plaintiff is protected if the

defendant is one who significantly affects access of any individual to employment opportunities."); *Satterfield v. State of Tennessee*, 295 F.3d 611, 618 (6th Cir. 2002) (same for ADA) (citing *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 17 (1st Cir. 1994) ("defendants would be 'employers' if they functioned as [the plaintiff's] 'employer' with respect to his employee health care coverage, that is, if they exercised significant control over an important aspect of his employment.")).

The definition of "employee" in the FMLA is even broader than that in the ADA. The FMLA incorporates by reference the definition used in the Fair Labor Standards Act. 29 U.S.C. § 2611(3). The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e). The FLSA defines "employ" as "to suffer or permit to work." 29 U.S.C. § 203(g). Thus, the FMLA's definition of "employee" is broader than the common law definitions applied in ADA, ADEA, and Title VII cases. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985) (describing FLSA definition as "exceedingly broad"); *Darden*, 503 U.S. at 326 (same); *Fegley v. Higgins*, 19 F.3d 1126, 1131-32 and n.5 (6th Cir. 1994) (same).

Ellis was entitled to present evidence establishing that he was an "employee" of the county for purposes of the ADA and the FMLA. He was not afforded that opportunity. Had he been, he would have taken depositions of his former supervisors who

worked with him in Bradley County, Tennessee, and presented additional evidence – such as the Affidavit of State Coordinator of Elections Brook K. Thompson attached to his Petition (Pet. 37a-43a) – proving his allegation that he was an employee of the county. It cannot truthfully be said that Ellis could prove no set of facts sufficient to support his claims.

Contrary to the county's argument, this case involves important issues of procedural and substantive law that are implicated in employment discrimination cases nationwide. In cases like this courts should not be permitted to decide that a plaintiff is not an employee of an entity under the federal anti-discrimination statutes without allowing him to present factual evidence relevant to the appropriate factors and indicia of employment. *Darden*, 503 U.S. at 327-28. The lower courts' decisions were incorrect and constitute a stark departure from the normal course of judicial proceedings such that this Court should reverse and remand the case to avoid a miscarriage of justice.

Finally, the county's contention that the issue of whether one is an employee of the state is a matter of federal law is incorrect. (Br. Opp. 10); *Swint v. Chambers County Commission*, 514 U.S. 35, 51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) ("The individual defendants' qualified immunity turns on whether they violated clearly established federal law; the county commission's liability turns on the allocation of law enforcement power in Alabama."); *see also Spurlock v. Sumner County*, 42 S.W.3d 75, 81 (Tenn. 2001)

("whether an officer is a policymaker for any governmental entity must be determined by reference to state, not federal law."). Notwithstanding the isolated dicta in *Abercrombie v. City of Chattanooga*, 313 S.W.2d 256, 258 (Tenn. 1958) indicating that an election commission was "not an arm of the county government" in that case, the lower courts here acknowledged that "[t]here is conflicting authority" and "[c]learly, the authorities are split" on the issue of whether Ellis was a county or state employee. (App. 7a, 15a). The Tennessee Legislature recently declined to enact legislation that would have made county election administrators such as Ellis, who are not "members" of the election commission, state employees. (Pet. 33a-36a). The State of Tennessee neither paid Ellis nor discharged him from employment. The county represented to the I.R.S. on Ellis' Form W-2s that it was his employer and it discharged him. Thus, the county is legally responsible for Ellis' discriminatory discharge from employment – not the state. *Cooper v. State of Tennessee*, 106 S.W.3d 688, 691 (Tenn. Ct. App. 2003) (so holding), *perm. app. denied*. Accordingly, in the alternative to reversal, the Court should vacate the decision of the court of appeals and certify the unsettled question of whether Ellis was a county or state employee to the Supreme Court of Tennessee.

CONCLUSION

Ellis respectfully requests that the Court summarily reverse the judgment of the court of appeals or grant a writ of certiorari to review it. Alternatively, Ellis requests that the Court certify the unsettled question of state law that the court of appeals decided itself to the Supreme Court of Tennessee.

Respectfully submitted,

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